Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER NATIONAL BROADCASTING COMPANY, INC.

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* The information required by Supreme Court Rule 28.1 is set forth in the Brief of Petitioner National Broadcasting Company, Inc. ("NBC Br.") at 2 n.**.

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REPLY BRIEF OF PETITIONER NATIONAL BROADCASTING COMPANY, INC.

The Brief for the Federal Communications Commission and the United States ("FCC Brief") confirms a number of the most disquieting aspects of the rulings below. The Commission's approach poses a substantial threat to the fundamental assumption of our political system that government will remain neutral in the electoral process, as well as to the concept, long-established as a keystone of broadcast regulation, of deference to reasonable broadcaster judgments. It is all the more striking that this approach has been adopted to implement a statute which neither by its explicit terms nor by its legislative history requires embarking upon so dangerous a course.

I.

The Commission's Interpretation and Application of Section 312(a)(7) Improperly Injects Government Into the Electoral Process and Destroys Broadcaster Discretion.

A. *The FCC's Assumption of Decision-Making Power With Respect to the Commencement of Federal Election Campaigns Poses a Substantial Threat of Government Intrusion Into the Electoral Process.*

The FCC has determined that it should decide, as an "objective" and "independent" matter, when a campaign is "fully underway," since it concludes that access requirements under Section 312(a)(7) attach only at that point (FCC Br. at 46-49). Its brief characterizes this decision as one designed to "narrow" the apparently otherwise unlimited reach of the Commission's understanding of the statute (*id.* at 47). What the Commission apparently views as an interpretation benefiting broadcasters simply illustrates the vice of its basic approach. If anything, such an explanation for the Commission's action and for its departure from its prior policy (under which the broadcaster's decision as to when to make access time available was considered as one element of overall reasonableness)* highlights the fact that the Commission is provided with no guidelines or boundaries for its excursion into the political

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* The Commission remains unwilling to face up to the flat contradiction between its present stance and the holding in *Anthony R. Martin-Trigona*, 66 F.C.C.2d 968 (Broadcast Bureau), *review denied*, 67 F.C.C.2d 33 (Broadcast Bureau 1977), *reconsideration denied*, 67 F.C.C.2d 743 (1978), where its Broadcast Bureau concluded that "[a] licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, but to the date on which campaign coverage will commence." 66 F.C.C.2d at 969. *Compare* FCC Br. at 46 n.34.

thicket by the statute itself—a statute whose draftsmen never contemplated such a role for the Commission.

Here, for example, the Commission determined that the Presidential campaign was "fully underway" and thereby signalled the opening of the broadcast campaign in an election where, its brief notes, *only* President Carter of all the candidates for that office had qualified for federal matching funds (FCC Br. at 53-54 n. 43).

This illustrates, as well, the dangers raised by the role that the Commission has arrogated to itself in the electoral process. The FCC, an agency whose members are appointed by the President, hereafter is to determine when each Presidential or other federal campaign is "fully underway"; candidates seeking access prior to that date will, the FCC states, have no rights whatever under the statute (*see* FCC Br. at 47). The potential for manipulation of the process by Presidential appointees who seek to hinder (or help) the prospects of particular candidates is apparent.*

B. *The Criteria Set Forth by the Commission for Assessment of a Broadcaster's Reasonableness Were Applied in a Fashion Which Maximizes Government Intrusion and Substitutes the Commission's Judgment for That of the Broadcaster.*

The FCC Brief refers to three factors to be considered in evaluating the reasonableness of a broadcaster's response to Section 312(a)(7) requests: "likely multiplicity of claims for reply time," "significant program disruption," and the "candidate's stated requirements" (FCC Br. at

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* This is particularly true when so amorphous a concept as judging when a campaign is "fully underway" is at issue. The Commission's brief uses this term and the "commencement of the campaign" interchangeably (*compare, e.g.*, FCC Br. at 46 n.34 *with* FCC Br. at 47 & n.37), although the concepts are not identical. This imprecision is characteristic of the subjective criteria used by the Commission as its tools of analysis in this area.

53).* The treatment accorded several of these criteria in the FCC Brief warrants comment.

1. The Candidate's "Needs"

The FCC's initial opinion in this case referred to the "candidate's needs" criterion as one that required "particular emphasis" (74 F.C.C.2d at 642; Pet. JA 87a); the Commission has vainly and inconsistently sought to explain and clarify the meaning of this concept ever since.** The FCC's Brief states that the broadcaster is to balance the "candidate's stated requirements" against the other two criteria—the probability of multiple requests and program disruption

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* Strikingly, the Court of Appeals decision identified *five* such factors (629 F.2d at 20; Pet. JA 35a-38a). The Commission seems to have dropped altogether its reliance on whether or not a request was a candidate's first request (*see* 74 F.C.C.2d at 667; Pet. JA 126a-127a; *see also* 74 F.C.C.2d at 679; Pet. JA 146a (once a campaign is underway "broadcasters must be responsive to the *first* request for a substantial segment of program time on behalf of a candidacy, unless there are compelling reasons for not honoring the request") (Concurring Statement of Commissioner Brown, emphasis in original)). Perhaps the Commission has itself recognized the impermissibility of such an arbitrary rule. Indeed, the emphasis on this criterion by Commissioner Brown in casting the decisive fourth vote itself provides an adequate basis for finding the decision to be arbitrary and capricious.

The fifth factor identified by the Court of Appeals, the timing of the request, seems no longer to be separately considered. Indeed, the FCC recently rejected a broadcaster's effort to give effect to this consideration by requiring a stated period of advance notice for such advertisements. *See Barry Commoner*, 48 R.R.2d 545 (FCC Broadcast Bureau 1980).

As these examples suggest, not the least of the problems that have faced petitioners in this case has been the constantly shifting articulation by the FCC of just what standards it believes should govern the conduct of broadcasters.

** It is primarily in reliance on this criterion of individual needs that the Commission has turned § 312(a)(7) into a statute affording individual candidates the right to "command" specific program lengths, formats, and times. As we discuss *infra*, in Part II, the statute was never intended to effect such a result, so destructive of broadcaster discretion as well as governmental neutrality.

(FCC Br. at 53). But *what* is the broadcaster to balance and how? Is it in some sense to assess the closeness of the fit between the stated purpose and the timing and length of the broadcast time sought by the candidate? The Commission seems to assume this to be the case—*i.e.*, that the broadcaster will evaluate whether the time requested by the candidate is really required to accomplish the candidate's political objectives. This seems a dubious role indeed for the broadcaster to perform under government mandate, subject to government review and the threat of license revocation. Yet there seems to be no alternative interpretation of the Court of Appeals' statement that

> "The [FCC's] decisions allow the broadcaster leeway to demonstrate . . . that a candidate's stated purpose could be accomplished with a lesser amount of time even if there is no probability that the other candidates will request time. Thus in the cases at hand a counter-offer of 15 minutes as opposed to a half-hour *may* have been defensible." (629 F.2d at 20; Pet. JA 37a; footnote omitted, emphasis in original).

What else could the Commission have meant when it concluded that CBS had failed to "explain how its two five-minute offers were responsive to the specific purpose of the complainant's particular request"? Or that "CBS provided no explanation as to how two such short segments could afford enough time for a discussion of subjects as broad as those the candidate intends to discuss"? (74 F.C.C.2d at 668; Pet. JA 128a-129a).

We have raised these questions in the Court of Appeals and in our initial brief to this Court.* The FCC has yet to

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* NBC advised the Commission that it accepted the candidate's statement of needs at face value and considered them in the balancing process without undertaking to "evaluate" those expressed needs (JA 176 n.*). Without explaining how this was unresponsive to its standards, the FCC rejected this response even as it revised the content of the criterion (74 F.C.C.2d at 670-71; Pet. JA at 132a-133a; *see also* 74 F.C.C.2d at 667-70; Pet. JA at 126a-131a).

provide any substantive answer. We urge the Court to compare the statements of the FCC and the Court of Appeals quoted above with the discussion in the FCC Brief at 49-50 and particularly at 50 n.40. (*See also* 74 F.C.C.2d at 642, 667-68; Pet. JA 87a-88a, 127a-128a).* The criterion of "candidate's needs" remains, as it has been from the outset, a dangerous threat to reasoned decision-making, devoid of articulated content, and holding the potential for sucking broadcaster and Commission alike into the political maelstrom.

2. Multiplicity of Candidates

This standard too has evolved during the course of the Commission's defense of its actions in this case. Obviously, when a broadcaster considers a particular candidate's request, it must consider the possibility of requests from other candidates both for access under Section 312(a)(7) and for equal time under Section 315(a). In its 1978 Report and Order, the FCC recognized as relevant the existence of "a multiplicity of candidates." 68 F.C.C.2d 1079,

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* While the Commission now characterizes the "candidate's needs" as an essential and inherent factor under § 312(a)(7), that view was not apparent in its initial interpretations of the statute. Thus, the Commission made no mention of the "candidate's needs" in its initial summary of broadcasters' obligations under § 312(a)(7), *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510 (1972). Nor did it refer to such a standard in its subsequent *Public Notice Concerning Licensee Responsibility under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 F.C.C.2d 516 (1974). Although the concept was referred to in the 1978 Report and Order, *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1089-90 (1978), the scope and emphasis now given to this factor were hardly made apparent there. In fact, despite the asserted crucial nature of the "candidate's needs", two weeks after releasing its 1978 Report and Order the Commission issued a comprehensive "Primer" which purports to cover the entire field of political broadcasting, yet omits any reference to this factor in dealing with § 312(a)(7). *See The Law of Political Broadcasting and Cablecasting*, 43 Fed. Reg. 36342, 36349-50, 36382-84 (1978).

1090 (1978). In keeping with this standard NBC put before the Commission in its response to the complaint in this matter the fact that at that time (November 1979), 12 candidates who had held federal elective office or a gubernatorial post, as well as 60 other candidates for the Presidency, had filed with the Federal Election Commission (JA 61). The FCC swept aside this submission, one geared to its announced standards. It announced a new standard, essentially insisting that the broadcaster adduce evidence of the candidates' actual intentions through interviews or other means (74 F.C.C.2d at 650-51; Pet. JA 101a). (The broadcaster is presumably to transmit these intentions to the FCC in the event of a challenge to the broadcaster's access decision.)

The FCC Brief now brings to its logical conclusion the transmutation of a useful tool for judging broadcaster reasonableness into one which obscures any rational review and intrudes still further into the political process. That Brief emphasizes the Commission's independent assessment of the facts and its conclusions that financial constraints would limit many candidates and that as of the date of the request for time "President Carter alone had qualified for federal matching funds" (FCC Br. at 53-54 n.43). It is an extraordinary argument which can rely upon the conclusion that but a *single* candidate was in a position to make use of national television at a given time to justify the government compelling a grant of broadcast time to *that* candidate—the incumbent President of the United States.*

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* In that same passage in its brief, the FCC also seeks to minimize the conceded fact that a "dozen major candidates" existed at the time of the Carter-Mondale request by asserting that "only candidates for the *Democratic* nomination . . . would be entitled to 'equal opportunities' under Section 315(a)" (FCC Br. at 53 n.43). In fact, however, the Commission's opinion itself recognized that "we cannot conclude that NBC acted unreasonably in considering the Republican candidates as well as the Democratic candidates in determining whether a 'multiplicity of candidates' problem in fact existed" (74 F.C.C.2d at 647; Pet. JA 96a).

3. Rejection of Any Uniform Policy Towards Candidates

The FCC Brief explicitly rejects the suggestion that a broadcaster may adopt uniform policies regarding requests for time by candidates for a given office, asserting that such policies in and of themselves would violate Section 312(a)(7) (FCC Br. at 50). This approach represents a striking departure from the policy followed under the public interest standard codified by Section 312(a)(7), as well as from the basic principle of equality reflected, since 1927, in the equal opportunities provisions of Section 315 (a). *See e.g., Humphrey for President Campaign,* 34 F.C.C. 2d 471 (1972); *W. Roy Smith,* 18 F.C.C.2d 747, 747-48 (Broadcast Bureau 1969); *Rosenbush Advertising Agency, Inc.,* 31 F.C.C.2d 782 (1971). Uniformity and evenhandedness of broadcaster policies ensure equality of treatment, avoid entangling broadcasters in the political process, and permit rational planning on the part of all. The FCC's recent rejection of this approach is premised on its understanding that individual political candidates are the intended "beneficiaries" of Section 312(a)(7) (FCC Br. at 51) and, as such, their specific needs and desires must be satisfied and the broadcaster must "tailor its response as much as possible to accommodate the request" (FCC Br. at 43). But the statute is not designed to benefit any individual candidate as such; it is designed to improve the campaign process itself (*see* NBC Br. at 48). The Commission's failure to accept this principle has led it down a path which entangles it impermissibly in the electoral process, which gives rise to an appearance of favoring one candidate for high office over another, and which compels broadcasters to evaluate the needs and tactics of individual candidates. Nothing in the language or history of Section 312(a)(7) supports such a result.

C. *The FCC's Failure to Defer to Reasonable Broadcaster Discretion Upsets the Delicate Balance of the System of Broadcast Regulation.*

The FCC Brief pays lip service to the general principle that it is obliged to defer to reasonable licensee judgments under Section 312(a)(7) (FCC Br. at 43-44). It states (FCC Br. at 55):

> "[T]he Commission was prepared in this case to listen to any reasonable explanation offered by the networks for their refusal to provide time. That explanation was never forthcoming."

That statement is demonstrably inaccurate. A consideration of the record manifests the extent to which the concept of deference to reasonable broadcaster decisions has been abandoned.

NBC provided the Commission with a specific and detailed explanation of the basis for its decision, addressing all of the criteria set forth in the Commission's 1978 Report and Order. The earliness of the requested broadcast dates relative to the campaign and the election itself, the local focus of the campaign in December 1979, the existence of at least a dozen major candidates for the Presidency, and programming considerations which increased the difficulty of accommodating the Carter-Mondale Committee's request on the four dates specified by the Committee (and accommodating as well potential time requests from other candidates) were all set forth as bases of NBC's decision (JA 60-74).

In response to these submissions, the FCC has offered a series of shifting grounds for its own decision, first finding that NBC was unreasonable in taking into account the earliness of the requested broadcast dates relative to the campaign (74 F.C.C.2d at 645-47; Pet. JA 91a-94a), then finding (contrary to its prior rulings) that this was not a factor to be judged by the reasonableness standard at

all (74 F.C.C.2d at 666-67; Pet. JA 124a-127a); first finding that a candidate's needs should be given "particular emphasis" and that this involves broadcaster evaluation of those needs (74 F.C.C.2d at 642; Pet. JA 87a), then backing away from those statements without providing any content to the concept of "candidate's needs" and while still charging the broadcasters with having failed to explain how they applied this formless criterion (74 F.C.C.2d at 667-68; Pet. JA 127a-129a); first finding that NBC was entitled to consider Republican as well as Democratic candidates in its assessment of multiple candidacies and the availability of time to accommodate possible additional requests (74 F.C.C.2d at 647; Pet. JA 96a), now stating that only Democrats should be considered (FCC Br. at 53 n.43); first finding, based on its own independent evaluation of financial constraints on candidates, that there existed no likelihood of significant requests for equal time (74 F.C.C. 2d at 647; Pet. JA 96a), now asserting that, in fact, only one candidate qualified for federal matching funds in the very campaign it determined was "fully underway" (FCC Br. at 53-54 n.43). The list could be extended, but we think the point is clear.* NBC has supplied a reasoned explanation of the basis for its decisions. That the Commission can state that no such explanation was provided suggests more about the shifting bases of the Commission's standards and its single-minded rejection of each explanation put forth by NBC and the other networks than about the adequacy of the explanatory effort. As Commissioner Lee recognized in his dissent from the Commission's holding:

> "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the

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* For a discussion of other inconsistencies in the Commission's application of § 312(a)(7), see NBC Br. at 25-26n.**.

view of the majority" (74 F.C.C.2d at 681; Pet. JA 149a-150a; footnote omitted).

* * *

The dangers to the broadcast and electoral system alike in the path followed by the FCC here are manifest. What is most striking is that these dangers are courted not in the service of a clearly mandated congressional command, but (1) in response to an agency interpretation of the statute without support in its language or legislative history, (2) in the face of a well-established congressional insistence on equal treatment of candidates (manifested in Section 315(a)), and (3) despite a long-standing congressional distrust of common carrier or initial access schemes. *See FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979).* *See also* NBC Br. at 28-34.

II.

The Decision Below Is Based on an Interpretation of Section 312(a)(7) Which Is Contrary to the Legislative History and Intent of That Provision.

The FCC Brief does not dispute the simple reality that the law as it existed prior to the enactment of Section 312(a)(7) did not vest an affirmative right of initial access such as the Commission now claims for Section 312 (a)(7). (FCC Br. at 22). Instead, the FCC asserts that the draftsmen of Section 312(a)(7) clearly intended to

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* In referring to the congressional antipathy towards common carrier systems incorporated in § 3(h) of the Communications Act (47 U.S.C. § 153(h) (1976)), we do not suggest, as the FCC Brief seems to conclude (at 26 n.16), that the congressional proscription of common carrier treatment itself presents an absolute bar to the Commission's interpretation of § 312(a)(7). Rather, we urged that so clear and repeated is the congressional disinclination to create common carrier status or its functional equivalent—and so serious the constitutional consequences of such action—that § 312(a)(7) should not be interpreted as the Commission suggests in the absence of the clearest manifestation of congressional intent.

and did create a statute significantly expanding access rights already existing under the "public interest" standard. This is an essential element of the FCC position, for it has been well-established that the public interest standard created no "entitle[ment] to demand of a particular station a specific amount of time in a specific format (in the absence of a use of the station by another legally qualified candidate for the same office under Section 315)." *Hon. Dan Walker*, 57 F.C.C.2d 799, 800 (Broadcast Bureau 1975). *See Humphrey for President Campaign*, 34 F.C.C.2d 471, 472 (1972); *Rosenbush Advertising Agency, Inc.*, 31 F.C.C.2d 782 (1971); *W. Roy Smith*, 18 F.C.C.2d 747 (Broadcast Bureau 1969). Despite its protestations to the contrary, the Commission's requirement of deference to the candidate's stated campaign needs creates precisely such an entitlement here.* Neither the language of the statute nor its legislative history supports this view.

The FCC Brief frequently refers to the "plain meaning" of Section 312(a)(7) and to its literal language and asserts that the meaning of this language is "unambiguous" (FCC Br. at 19, 20 n.8). It is difficult to reconcile this position with the FCC's own recognition in its opinions in this very case that the "statutory language does not expressly define the scope of the Commission's responsibilities or the procedures by which it should enforce them" (74 F.C.C.2d at 637; Pet. JA 78a), and that "the legislative history of Section 312(a)(7) does little to clarify those responsibilities and procedures" (*id.*). It is this statute whose "plain meaning" the FCC now urges resolves all questions and authorizes the extraordinary inroads upon governmental neutrality and broadcaster discretion discussed in our main brief (NBC Br. at 17-33).**

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* This is particularly evident with respect to a "first request" which, absent proof of "compelling reasons," must apparently always be honored (74 F.C.C.2d at 679; Pet. JA 146a).

** Were this not enough to suggest the fatuousness of the appeal to the literal meaning of the statute as the answer to all ques-

The FCC's interpretation of the meaning of Section 312 (a)(7) as creating a sweeping new right is not one which flows from any "literal" reading of the statute. The statute, by its terms, states a specific penalty for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." It does *not* by its terms create any rights on the part of anyone; it was added as part of a section that provides specific penalties for acts or omissions by licensees. None of the seven paragraphs of Section 312(a) purports to establish in itself the nature of the obligation owed by the licensee; rather, the listing is designed to describe the violations or omissions to which the sanction of license revocation may be applied.* This contrasts starkly with provisions of the Communications Act such as Section 315(a), which both in title ("Facilities for candidates for public office") and in substance** imposes specific duties on broadcasters. Un-

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tions, that point may also be illustrated by the instances in this case in which the FCC itself has declined to find the "literal meaning" of the statute to control. Thus, the statute refers only to "broadcast stations," not to television networks. The Commission chose not to rely on this literal language, but instead to determine "the legislative intent" (74 F.C.C.2d at 639-40; Pet. JA 81a-82a). The question of whether § 312(a)(7) reaches "networks" has not been argued on this petition; the FCC's treatment of the issue casts still further doubt, however, upon its new assertion that anything akin to a "literal" reading of the statute has been adopted here.

Similarly, the FCC Brief emphasizes still another departure from any literal reading of the statute in what it describes as the Commission's limiting construction designed to "narrow the statute's coverage" by restricting the candidate's access rights to the period when a campaign is "fully underway" (FCC Br. at 47). The recognition that the literal reading—at least the FCC's literal reading—extends too far is suggestive of the impropriety of the basic interpretation put forth by the FCC.

* The full text of § 312(a) is set forth in a Statutory Addendum to this Reply Brief.

** "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, *he*

der these circumstances, Section 312(a)(7) can hardly be read to *create* a new substantive right, rather than to recognize and provide a sanction to aid enforcement of existing rights.

The legislative history of the section fully supports this interpretation. The FCC Brief seeks to avoid the impact of that history by quoting excerpts out of context rather than quoting the relevant passages in full, and by ascribing to Section 312(a)(7) purposes it was not meant to serve while endorsing interpretations which frustrate other general purposes of the legislation.*

The two detailed discussions of the purposes underlying passage of Section 312(a)(7) are those included in S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773, set forth in full at pp. 41-42 of our main brief. The FCC Brief does not seem to dispute this, but it obscures the significance of these discussions by never quoting them in full and by separating passages which are contiguous in the Senate Report so as to suggest a meaning which is absent when the text is read in its original form. *Compare* FCC Br. at 30-31, nn. 20 & 21, *with* NBC Br. at 41-42. Thus, the FCC Brief at 31 n.21 refers to the asserted "separate treatment" accorded the (preexisting) public interest standard in the Senate Report. In fact the passage relied upon follows directly the Report's description of Section 312(a)(7);** the FCC Brief reproduces the consecutive sentences

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shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ." 47 U.S.C. § 315(a) (emphasis added).

* These other general purposes were the shortening of political campaigns and rendering them less expensive. *See* NBC Br. at 46-47.

** The passage in full text is as follows:

"Section 101(c) was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee to allow reasonable

in separate footnotes, thereby creating out of whole cloth the "separate treatment" to which it refers—a separate treatment not present in the legislative history.

The FCC Brief also attempts to minimize the Senate Report's emphasis on the continuing nature of the obligation by again trying to create a dichotomy between then-existing law and the asserted new goal of the legislation. In this case it takes two words appearing six pages apart in the Senate Report and joins them in an effort to suggest that only the "general" obligation would "continue" while a new obligation was also being imposed.* In fact the

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> access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a l[e]gally qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.
>
> "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the comm[unities] of license. The Federal Communications Commission has recognized this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960).*" S. Rep. No. 96, 92d Cong., 1st Sess. 34 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1787.

The FCC Brief at n.20 quotes a portion of the first paragraph. It then refers at n.21 to the assertedly "separate treatment" accorded the general public interest standard and quotes a portion of the second paragraph.

* The FCC Brief states at 31 n.21:

> "Congress intended that this 'general' public interest requirement would 'continue' to be enforced at three year intervals in the license renewal context, not in license revocation proceedings (*id.* at 28)."

Neither the phrase "general" public interest nor any variant thereof appears in the passage at p. 28 of the Senate Report cited by the FCC, but a similar phrase appears as part of the passage of the Report quoted at 14 n.** of this Reply Brief; as is evident, that passage provides no support for the FCC's position. The reference to the expectation that the FCC would "continue" to enforce the existing obligation does in fact appear at p. 28 of the Senate Report, in the context of a passage, quoted in the text *infra* at 16, which explicitly refutes the Commission's position.

reference in the Senate Report itself to the obligation which would "continue" makes clear that Section 312(a)(7) was not intended to expand or alter existing substantive principles (as opposed to enforcement sanctions):

> "The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, *and the FCC should continue to consider the extent to* which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license. *Certainly no diminution in the extent of such programming should result from the enactment of this legislation.*
>
> *"In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation, S. 382 contains an express provision to this effect."* S. Rep. No. 96, *supra*, at 28, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1781-82 (emphasis added).*

The fragmented presentation of the legislative history in the FCC Brief is echoed by its bold attribution to Congress of a purpose never identified with Section 312(a)(7). Thus, the FCC states: "And when, in 1972, Congress enacted Section 312(a)(7), it unambiguously stated the objective: to 'give candidates for public office greater access to the media . . .'" (FCC Br. at 14; *see also id.* at 30). Yet the passage relied upon (S. Rep. No. 96, *supra*, at 20, *reprinted in* [1972] U.S. Cong. & Ad. News at 1774) as "unambiguous" does not even mention Section 312(a)(7) as a tool for accomplishing this purpose, although it ex-

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* This passage also sets forth a clear explanation of a basis for limiting § 312(a)(7) to federal candidates since only such candidates were "covered by the spending limitation in the legislation." *Compare* FCC Br. at 23 n.13.

plicitly refers to those sections that *are* designed "to accomplish" that purpose.*

The legislative history of Section 312(a)(7) canvassed above and in our initial brief suggests the limited purposes

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* The full passage in the Senate Report is as follows (the first paragraph is quoted in the FCC Brief at 30):

> "The purpose of title I is twofold. It attempts to give candidates for public office greater access to the media so that they may better explain their stand on issues, and thereby more fully and completely inform the voters.
>
> "Second, it attempts to halt the spiraling cost of campaigning for public office. *Voters' Time*, a report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, eloquently demonstrated this fact. This problem seems to be rapidly increasing.
>
> "To accomplish its purpose, Title I, as amended, would do the following:
>
> "1. Make the equal opportunities requirement of section 315(a) of the Communications Act, as amended, inapplicable to the use of broadcast facilities by legally qualified candidates for President and Vice President in primary and general election campaigns.
>
> "2. Require that broadcast licensees charge legally qualified candidates for any public office no more than their lowest unit rate during the 45 days before a primary election, and 60 days preceding a general or special election.
>
> "3. Establish reasonable and adequate limitations on the amount of money that may be spent for use of the broadcast media and nonbroadcast media by or on behalf of legally qualified candidates for the offices of President, Vice President, United States Senator or Representative, Delegate or Resident Commissioner to the Congress (Federal elective office) in primary, general and special elections.
>
> "4. Require that 45 days before a primary election and 60 days before a general election any person who charges a legally qualified candidate for the office of President, Vice President, United States Senator or Representative, or Delegate or Resident Commissioner (Federal elective office) for space in the nonbroadcast Communications media (newspapers, magazine, and other periodical publications, and billboard facilities) do so at the lowest unit rate charged others for the same amount of space.
>
> "5. Enable the States by law to adopt spending limitations in the broadcast media for candidates for state and

of the section:* to reduce to statutory form existing obligations, to provide a specific, severe penalty for willful or repeated violation of that obligation without regard to broadcaster performance in other areas, and to ensure that other changes in the overall regulatory structure—including expenditure limitations and elimination of equal time requirements (the latter eventually not enacted)—did not lead to a "diminution" of time made available to political candidates.** The Congress which enacted Section 312(a)(7)***

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local office." S. Rep. No. 96, *supra*, at 20-21, *reprinted in* [1972] U.S. Cong. & Ad. News 1774.

The FCC Brief at 30 n.19 attempts to avoid the omission of § 312(a)(7) from this passage by referring to other passages which *do* refer to § 312(a)(7). The passages referred to do not link § 312(a)(7) to the purpose of providing "increased access."

* This Court has similarly recognized the narrow scope of the statute. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-14, n.12 (1973). We believe the FCC's discussion (FCC Br. at 37-40) of this Court's analysis is clearly at odds with the language of the footnote in question and the text to which it relates. The passage in this Court's opinion correctly states the law (as then urged upon this Court by the Commission) and we urge this Court to reaffirm that statement. (*See* NBC Br. at 37-40.)

** The FCC Brief ascribes considerable significance to the "conforming amendment" added to § 315(a) at the time § 312(a)(7) was enacted (FCC Br. at 31-32). As pointed out in our initial brief (NBC Br. at 45 n.*), the amendment essentially restored language originally contained in § 315(a) but dropped when the section was codified. The 1971 amendment, noting merely that "[n]o obligation is imposed *under this subsection* upon any licensee to allow the use of its station" by any candidate is functionally identical to the original "[n]o obligation is *hereby* imposed" language of § 315(a) (emphasis added). Neither phrase in any way defines the scope of any "access" and the 1971 "conforming" amendment in no way suggests any alteration of the existing law. The amendment reflects the fact that the approach previously embodied in the Commission's public interest standard was put in statutory form for federal campaigns by § 312(a)(7); it certainly does not alter the conclusion apparent in the history of § 312(a)(7) itself that the section was merely intended to codify that public interest obligation.

*** The FCC's treatment in its Brief of the subsequent legislative history of § 312(a)(7) is less than persuasive. The FCC

did not contemplate and most certainly did not authorize the creation of an individual right of initial access on "command" (*Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 113 (1973)), to say nothing of one implemented by the FCC under an approach so fraught with danger for the political and broadcast systems.*

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claims that in 1973 it brought its present interpretation of the statute to the attention of Congress in the form of its 1972 Public Notice, and that Congress, through Senator Pastore, explicitly endorsed this approach (FCC Br. at 34-35). Neither the 1972 Notice nor any other FCC policy statement or ruling existing at the time, however, even remotely suggested that an individual right of initial access had been created which allows a candidate to command access in conformity to his stated needs and which in so doing forbids uniform and even-handed policies sanctioned under the very public interest standard which § 312(a)(7) embodied. Indeed, FCC Chairman Burch stated that the Commission had approached with caution the "difficult questions" arising under § 312(a)(7), in view of its "somewhat ambiguous statutory language and meager legislative history." *Federal Election Campaign Act of 1971: Hearings on S. 372 Before the Communications Subcomm. of the Senate Comm. on Commerce,* 93d Cong., 1st Sess. 137 (1973). See also the more recent reference of the FCC's general counsel to the "very difficult legal and interpretive and constitutional questions that concern section 312(a)(7)". *Repeal of "Equal Time" Requirements: Hearing on H.R. 6103 Before the Communications Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 96th Cong., 2d Sess. 37 (1980). It is this statute which the Commission now urges is clear on its face.

* Contrary to the FCC Brief at 36 n. 25, it is not the case that the House Subcommittee on Communications, in recent hearings, was "advised of the manner in which the Commission had interpreted Section 312(a)(7) in the instant case and expressed no disapproval" (citing *Repeal of "Equal Time" Requirements, supra,* at 42). In fact, members of the Subcommittee, inquiring into the effect on § 312(a)(7) of a proposed repeal of the equal time provisions of § 315(a) with respect to free time afforded to Presidential candidates, were merely told by the FCC's general counsel that "the question of what 312(a)(7) does require is now being litigated in the court of appeals and one of the issues in that case is whether 312(a)(7) imposes an individual obligation to provide time, or only codifies the long-standing obligations to provide time in general." *Repeal of "Equal Time" Requirements, supra,* at 42.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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After a confused exchange with a member of the Subcommittee that never even referred to this issue, the FCC's counsel concluded: "I think it is just not clear how those provisions [*i.e.* § 312(a)(7) and the proposed partial repeal of § 315(a)] would operate together. I am sorry not to satisfy you in interpreting section 312 (a)(7), but it is a very difficult provision." *Id.* at 43. Moreover, counsel for the Subcommittee did *not*, as the FCC Brief at 36 n.25 states, "agree[ ] with the view that Section 312(a)(7) creates a right of access for *individual* federal candidates" (emphasis in original). The Subcommittee counsel did nothing more than repeat the language of the statute itself. *See Repeal of "Equal Time" Requirements, supra,* at 43.

STATUTORY ADDENDUM

STATUTORY ADDENDUM

47 U.S.C. § 312(a) provides:

"**§ 312. Administrative sanctions**

(a) Revocation of station license or construction permit.

"The Commission may revoke any station license or construction permit—

"(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

"(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

"(3) for willful or repeated failure to operate substantially as set forth in the license;

"(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

"(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

"(6) for violation of section 1304, 1343, or 1464 of title 18; or

"(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."